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PECD CONSTRUCTION SDN BHD

v.

FREEHOLD POINT SDN BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
VINCENT NG J
[CIVIL SUIT NO: D1-22-1525-2006]
18 JANUARY 2008

C ***CIVIL PROCEDURE:*** *Injunction - Injunction against a s. 218 notice of Companies Act 1965 - Notice based on defendant's claim for balance of purchase price for goods sold and delivered to plaintiff - Plaintiff's complaints on quality and shortfall of goods - Whether plaintiff entitled to raise complaints since complaints not made within reasonable time goods*
D *received - Whether plaintiff's allegation of fraud substantiated - Whether plaintiff deemed to have admitted to debt by not disputing amount in defendant's letter*

The plaintiff applied for an injunction against a s. 218 notice of
E the Companies Act 1965 by the defendant. The notice was based on the defendant's claim for the balance of the purchase price in the sum of RM133,640 for goods sold and delivered to a company called New MK Marble and Granite Sdn Bhd ('MK Marble'), the payment of which was to be made by the plaintiff. The plaintiff
F raised issues on the quality of the goods, the shortfall of the goods supplied, and on an allegation of fraud that the recipient of the goods, one Charles, was the husband of the defendant's director.

Held (dismissing the plaintiff's application for injunction):

G

(1) Considering that the plaintiff had not at any time raised any complaint to the defendant concerning the quality or shortfall of the goods concerned, they should not be now heard to raise this issue. It is trite law that in cases of goods sold and
H delivered, if evidence shows that a party had accepted the goods but failed to make any complaints in terms of quality or shortfall within a reasonable time, he is deemed to have accepted the goods unconditionally. In the present case, the plaintiff had not, within a reasonable time complained about
I the goods received by MK Marble. (para 3)

(2) It was common ground that Charles had acknowledged receipt of the goods and that at the material time he was an employee and project manager of MK Marble. Nevertheless, he had made known at all times that he was the husband of the defendant's director. The plaintiff had acquiesced to that state of affairs and had not raised any objection in that regard until the defendant started to pursue its claim for the goods sold and delivered. Hence, the allegation of fraud was unsubstantiated. (para 4)

(3) The plaintiff did not deny the receipt of the defendant's letter that stated that the plaintiff agreed to release to the defendant payment for the balance of the purchase price. Nor was there any letter to dispute the debt of RM133,640. Since there was no oral or written response to that letter, the plaintiff should be deemed to have admitted the said debt. It followed that the amount demanded in the s. 218 notice was a debt clearly due and outstanding to the defendant and the injunction prayed for ought to be dismissed with costs. (paras 6 & 7)

Case(s) referred to:
David Wong Hon Leong v. Noorazman Adnan [1995] 4 CLJ 155 CA ***(refd)***
Pembinaan Lian Keong Sdn Bhd v. Yip Fook Thai [2005] 6 CLJ 34 HC ***(refd)***

Legislation referred to:
Companies Act 1965, s. 218

For the plaintiff - Sanjay Mohanasundram (Joyce Lim Mei Ting with him); M/s Hishammuddin Allen & Gledhill
For the defendant - Alex Chang; M/s Alex Chang & Co

Reported by Usha Thiagarajah

JUDGMENT

Vincent Ng J:

[1] The defendant's claim is for the balance purchase price on goods delivered to New MK Marble and Granite Sdn Bhd ('New MK Marble'), the order of, and payment for which was expressly agreed to be made by the plaintiff. To be noted is that PEDC is formerly known as Peremba Construction.

[2] There were only three issues raised by the plaintiff, namely: (a) quality; and (b) shortfall of the goods supplied to and received by New MK Marble; (c) allegation of fraud against the defendant

since the recipient of the goods was one Charles Lee Chye Hin ('Charles') who was the husband of the defendant's directors/ shareholders named Madam Shu Yoke Mui.

Re (a) Quality And (b) Shortfall

[3] Considering that the plaintiffs had not at any time raised any complaint to the defendant concerning the quality or shortfall of the goods concerned they should not now be heard to raise this issue. It is this court's observation that the letter of complaint dated 9 March 2006 adduced by the plaintiff as exh. 'A-5' was in fact a letter from New MK. Marble & Granite Sdn Bhd which was addressed to Peremba Trading Sdn Bhd. This 9 March 2006 letter was indeed acknowledged and initialled as received by the latter at 3pm on 24 May 2006 - with their rubber stamp bearing the words (similar to exh. 'SYM-1' of encl.7) 'PH05 Peremba Construction ...'. It is trite law that in cases of goods sold and delivered, if evidence shows that a party had accepted the goods but fails to make any complaints in terms of quality or shortfall within a reasonable time he is deemed to have accepted the goods unconditionally. This court would have to take note that the plaintiffs had not, within a reasonable time, complained about the goods received by New MK Marble.

Re (c) Allegation Of Fraud

[4] It is common ground that Charles had acknowledged receipt of the goods and that at the material time he was an employee and project manager of New MK Marble. But, a factor which I hold in favour of the defendant is that even at the time of his application for the job in New MK Marble he had stated that Mdm Shu Yoke Mooi was his spouse (see exh 'A-6' of encl 3). Furthermore, Charles was the only person charged with the duty of liaising with the plaintiff and he had done so on a regular basis as the defendant had no sales personnel. I do not see how could there be any fraud committed by the defendant, as the plaintiff must have been aware of this relationship between Charles and Madam Shu Yoke Mui, and had acquiesced to this state of affairs. Furthermore, the plaintiffs had not complained or raised any objection in this regard until the defendant started to pursue this claim for the goods sold and delivered.

Re (d) Any Acknowledgement Of Debt

[5] The defendant's case is that they have written to the plaintiff a letter dated 24 March 2006 (rubberstamped as received on 25 March 2006 by 'PH0S, Peremba Construction ...') which, *inter alia*, stated that the plaintiff had agreed to release to the defendants payment of the balance of RM133,640 (see exh. 'SYM-1' encl. 7). The letter states as follows:

Freehold Point Sdn. Bhd. (331140-V)

24th March 2006

Peremba Construction Sdn Bhd
Block ... Peremba Square,
Saujana Resort, Seksyen U2
41050 Shah Alam
Selangor Darul Ehsan

Attn: Puan Radzillah Mahmood

Dear Puan,

Re: P.O. No PHOS/po/01808
D/O No. 0025/06, dated 10 February 2006
D/O No. 0026 & 0027/06 dated 22 February 2006
Invoice No. T/0028/06

The above P.O, d/o and Invoice refers.

As per your instruction the goods ordered by you been delivered to your sub-contractor M/S New MK' Marble & Granite Sdn Bhd factory in Semenyih since 22nd February 2006. We are please to inform you that they are in the process of cutting to sizes and will be release and send to your project site for installation soon.

During the site meeting with En Akmal of KLCC, your goodself had agreed to release the balance of the sum amounting to RM133,640.00 to us and that was weeks ago.

We looking forward to receive your cheque of RM133,640.00 soon.

Thank you.

Yours faithfully

Sgd.
Freehold Point Sdn Bhd" (Emphasis added)

[6] The receipt of this letter was never denied by the plaintiffs in their affidavits nor was there any letter to dispute the debt. Thus, the defendants' case is that because there was no oral or written response to this letter they should be deemed to have admitted the said debt of RM133,640. On this point, I am inclined, and indeed bound to follow the decision of the Court of Appeal in, *David Wong Hon Leong v. Noorazman Adnan* [1995] 4 CLJ 155, where Gopal Sri Ram, JCA had this to say - which accords to good reasoning:

> On December 17, 1991, the respondent **wrote to the appellant confirming an agreement between them whereby the former was to receive an additional fee of RM100,000** if he assisted in resolving the problem regarding the access. It is the respondent's case that he did in fact obtain the required access through his exertions. The appellant, however, denies any agreement to pay the additional fee. In respect of this sum, the learned Judge granted leave to defend. We would digress for a moment to say a few words about this latter order of the learned judge. During argument, we registered our surprise at the learned judge's reluctance to enter judgment for his sum of RM100,000. After all, the appellant had failed to respond to the letter of December 17. If there had never been an agreement as alleged, it is reasonable to expect a prompt and vigorous denial. But, as we have pointed out, there was no response whatsoever from the appellant.
>
> In this context, we recall to mind the following passage in the judgment of Edgar Josept Jr J in *Tan Cheng Hock v. Chan Thean Soo* [1986] 1 LNS 42:
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> > In *Wiedemann v. Walpole* [1891] 2 QB 534, 537 an action for breach of promise of marriage, it was held, that the mere fact that the defendant did not answer letters written to him by the plaintiff in which she stated that he had promised to marry her, was no evidence corroborating the plaintiff's testimony in support of such promise.
>
> Lord Esher MR, in his judgment, remarked.
>
> Here, we have only to see whether the **mere fact** of not answering the letters, **with nothing else** for us to consider is any evidence in corroboration of the promise. (Emphasis added).
>
> Earlier, in his judgment, he said.

> *Now there are cases - business and mercantile cases-in which the courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree*. (emphasis added)

(See also my decision *Pembinaan Lian Keong Sdn Bhd v. Yip Fook Thai* [2005] 6 CLJ 34).

[7] In the event, I find that the amount demanded in the said s. 218 notice is a debt clearly due and outstanding to the defendants and the injunction now prayed for in encl. 4 ought to be and is now dismissed with costs.